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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ARTHUR DUANE JACKSON, Defendant and Appellant.	B296340 (Los Angeles County Super. Ct. No. NA020015)

APPEAL from a postjudgment order of the Superior Court of Los Angeles County, Laura L. Laesecke, Judge. Affirmed.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Jason Tran and Shezad H. Thakor, Deputy Attorneys General, for Plaintiff and Respondent.

Arthur Duane Jackson appeals from a postjudgment order summarily denying his petition for resentencing under Penal Code section 1170.95,[1] contending the superior court erred in ruling section 1170.95 did not apply to attempted murder and denying his petition without first appointing counsel and conducting a hearing at which the parties could present evidence. We previously rejected Jackson's first argument in *People v. Lopez* (2019) 38 Cal.App.5th 1087, review granted November 13, 2019, S258175 (*Lopez*),[2] and his second argument in *People v. Verdugo* (2020) 44 Cal.App.5th 320, review granted March 18, 2020, S260493 (*Verdugo*).[3] Because Jackson has advanced no

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[1] Statutory references are to this code.

[2] The Supreme Court in *Lopez*, *supra*, S258175 limited review to the following issues: "(1) Does Senate Bill No. 1437 (Stats. 2018, ch. 1015) apply to attempted murder liability under the natural and probable consequences doctrine? (2) In order to convict an aider and abettor of attempted willful, deliberate and premeditated murder under the natural and probable consequences doctrine, must a premeditated attempt to murder have been a natural and probable consequence of the target offense? In other words, should *People v. Favor* (2012) 54 Cal.4th 868 be reconsidered in light of *Alleyne v. United States* (2013) 570 U.S. 99 and *People v. Chiu* (2014) 59 Cal.4th 155?"

[3] The Supreme Court in *Verdugo*, *supra*, S260493 ordered briefing deferred pending its disposition of *People v. Lewis* (2020) 43 Cal.App.5th 1128, review granted March 18, 2020, S260598. The Court limited briefing and argument in *People v. Lewis* to the following issues: in which the issues to be briefed and argued are limited to "(1) May superior courts consider the record of conviction in determining whether a defendant has made a prima facie showing of eligibility for relief under Penal Code section

persuasive reason for us to reconsider our decision in either case, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Jackson was convicted following a jury trial in December 1994 of attempted premeditated murder and carjacking with a true finding that he had used a gun when committing the carjacking. The court sentenced Jackson to an indeterminate life term in state prison.

In January 2019 Jackson petitioned for resentencing pursuant to section 1170.95 and requested the court appoint counsel for him during the resentencing process. In his petition Jackson declared under penalty of perjury, "At trial, I was convicted of 1st or 2nd degree attempted murder pursuant to the felony [murder] rule or the natural and probable consequences doctrine." The court summarily denied the petition on February 6, 2019, ruling, "[S]ection 1170.95 applies to murder, not attempted murder. Therefore, Petitioner does not qualify for resentencing." In its minute order the court noted Jackson was not present in court and was not represented by counsel.

Jackson filed a timely notice of appeal.

DISCUSSION

1. *Senate Bill No. 1437 and the Right To Petition To Vacate Certain Prior Convictions for Murder*

Senate Bill No. 1437 (2017- 2018 Reg. Sess.) (Stats. 2018, ch. 1015) (SB 1437), effective January 1, 2019, amended the felony murder rule and eliminated the natural and probable consequences doctrine as it relates to murder through

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1170.95? (2) When does the right to appointed counsel arise under Penal Code section 1170.95, subdivision (c)?"

amendments to sections 188 and 189. New section 188, subdivision (a)(3), provides, "Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime."[4]

New section 189, subdivision (e), in turn, provides with respect to a participant in the perpetration or attempted perpetration of a felony listed in section 189, subdivision (a), in which a death occurs—that is, as to those crimes that provide the basis for the charge of first degree felony murder—that the individual is liable for murder "only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2."

SB 1437 also permits, through new section 1170.95, an individual convicted of felony murder or murder under a natural and probable consequences theory to petition the sentencing court to vacate the conviction and be resentenced on any

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[4] Prior to enactment of SB 1437, section 188, subdivision (a), provided, "Such malice may be express or implied. [¶] (1) It is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature. [¶] (2) It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."

remaining counts if he or she could not have been convicted of murder because of SB 1437's changes to the definition of the crime. Section 1170.95, subdivision (c), requires the sentencing court to review the petition; determine if it makes a prima facie showing the petitioner falls within the provisions of section 1170.95; and, if the petitioner has requested counsel, to appoint counsel to represent the petitioner. After counsel has been appointed, the prosecutor is to file and serve a response to the petition; and the petitioner may file a reply. If at this point the court finds the petitioner has made a prima facie showing he or she is entitled to relief, the court must issue an order to show cause (§ 1170.95, subd. (c)) and conduct a hearing to determine whether to vacate the murder conviction and resentence the petitioner on any remaining counts (§ 1170.95, subd. (d)(1)).[5]

2. *The Superior Court Properly Concluded Jackson Is Ineligible as a Matter of Law for Any Relief Under Section 1170.95*

a. *Jackson's statutory arguments*

In *Lopez*, *supra*, 38 Cal.App.5th at page 1104 we held SB 1437 does not modify the law of attempted murder, explaining there was nothing ambiguous in the language of the legislation, which, in addition to omitting any reference to attempted murder, specifically identifies its purpose as the need "to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual

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[5] Once an evidentiary hearing has been ordered, the People may present new and additional evidence to demonstrate the petitioner is not entitled to resentencing. The petitioner also may present new or additional evidence in support of the resentencing request. (§ 1170.95, subd. (d)(3).)

killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).) We added that the Legislature's obvious intent to exclude crimes other than murder "is underscored by the language of new section 1170.95, the provision it added to the Penal Code to permit individuals convicted before Senate Bill 1437's effective date to seek the benefits of the new law from the sentencing court. Section 1170.95, subdivision (a), authorizes only those individuals 'convicted of felony murder or murder under a natural and probable consequences theory' to petition for relief; and the petition must be directed to 'the petitioner's murder conviction.' Similarly, section 1170.95, subdivision (d)(1), authorizes the court to hold a hearing to determine whether to vacate 'the murder conviction.'" (*Lopez*, at pp. 1104-1105.)

We recognize our colleagues in the Fifth District, in *People v. Larios* (2019) 42 Cal.App.5th 956, review granted February 26, 2020, S259983, and *People v. Medrano* (2019) 42 Cal.App.5th 1001, review granted March 11, 2020, S259948, came to a contrary conclusion, holding SB 1437 applied not only to murder but also to attempted murder under the natural and probable consequences theory of liability. (*Larios*, at pp. 966-967; *Medrano*, at p. 1015.) The *Medrano* court reasoned, "When the Legislature amended section 188 to state '[m]alice shall not be imputed to a person based solely on his or her participation in a crime' [citation], it made no exceptions for attempted murder, which indisputably requires express malice. [Citation.] By failing to exclude attempted murder from the ambit of section 188, the Legislature must have intended for its

provisions to apply to all crimes requiring express malice." (*Medrano*, at pp. 1014-1015.)[6]

We certainly understand how the courts in *Larios* and *Medrano* arrived at their conclusion. Generally, to be guilty of an attempt to commit a crime, the defendant must have specifically intended to commit all the elements of that offense; and an accomplice must have shared the actual perpetrator's intent. But that is an accurate statement of the law only as to direct aider-and-abettor liability, not aider-and-abettor liability for a nontarget offense under the natural and probable consequences doctrine. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118 ["when the charged offense and the intended offense—murder or attempted murder—are the same, . . . the aider and abettor must know and share the murderous intent of the actual perpetrator"]; see *People v. Chiu* (2014) 59 Cal.4th 155, 158 ["There are two distinct forms of culpability for aiders and abettors. 'First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also "for any other offense that was a 'natural and probable consequence' of the crime aided and abetted"'"].)

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[6] Although holding SB 1437 prospectively eliminated the crime of attempted murder based on the natural and probable consequences doctrine, the court in *People v. Larios*, *supra*, 42 Cal.App.5th 956 and *People v. Medrano*, *supra*, 42 Cal.App.5th 1001, relying on the actual language used by the Legislature, held the relief provided by section 1170.95 was limited to convictions for murder. (See *Larios*, at p. 970; *Medrano*, at pp. 1017-1018.)

As the Supreme Court explained in *People v. Chiu*, *supra*, 59 Cal.4th 155, murder charged under the natural and probable consequences doctrine is based on a theory of vicarious liability, not actual or imputed malice: "Aider and abettor culpability under the natural and probable consequences doctrine is vicarious in nature. [Citations.] 'By its very nature, aider and abettor culpability under the natural and probable consequences doctrine is not premised upon the intention of the aider and abettor to commit the nontarget offense because the nontarget offense was not intended at all. It imposes vicarious liability for any offense committed by the direct perpetrator that is a natural and probable consequence of the target offense. [Citation.] Because the nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime.'" (*Chiu*, at p. 164.)

SB 1437's amendments to section 188, as *Larios* and *Medrano* recognized, significantly modified the law of murder: Evidence of express malice is now necessary to convict any defendant of murder except under the felony-murder rule as stated in section 189, effectively eliminating the natural and probable consequences doctrine as a basis for murder liability. But the Legislature made no comparable change with respect to attempted murder. Express malice still need not be proved to convict a defendant of attempted murder charged as the natural and probable consequence of a target crime. In short, SB 1437's legislative prohibition of vicarious liability for murder does not, either expressly or impliedly, require elimination of vicarious liability for attempted murder. (See *Lopez*, *supra*, 38 Cal.App.5th

at p. 1106; *People v. Munoz* (2019) 39 Cal.App.5th 738, review granted Nov. 26, 2019, S258234.)[7]

b. *Jackson's constitutional argument*

As part of our analysis in *Lopez*, we expressly considered, and then rejected, the argument made by Jackson that the Legislature's decision to limit the reform of aider and abettor liability under the natural and probable consequences doctrine to instances where the nontarget offense is murder violates equal protection. We first held individuals convicted of murder and those convicted of attempted murder (or other nontarget offenses) under the natural and probable consequences doctrine are not similarly situated. (*Lopez*, *supra*, 38 Cal.App.5th at pp. 1107-1108.) Even if they were, we continued, the limitation of SB 1437 to individuals convicted of murder under the natural and probable consequences doctrine is subject to rational basis review (*Lopez*, at p. 1110), and constitutionally adequate, plausible reasons exist for the Legislature's decision (*id.* at p. 1111). Nothing in Jackson's briefing indicates the constitutional analysis in *Lopez* should be revisited.

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[7] The court in *Larios* and *Medrano* responded to this aspect of our analysis in *Lopez*, *supra*, 38 Cal.App.5th at page 1106 by noting Black's Law Dictionary's definition of "impute" states the word ""'is sometimes used to attribute vicariously,—to ascribe as derived from another."'" (*People v. Larios*, *supra*, 42 Cal.App.5th at p. 967, fn. 2; *People v. Medrano*, *supra*, 42 Cal.App.5th at p. 1014, fn. 5.) Fair enough. But as the Supreme Court unequivocally states in *People v. Chiu*, *supra*, 59 Cal.4th at page 164, it is liability that is imposed vicariously under the natural and probable consequences doctrine—"imputed," if you will—not the actual perpetrator's mens rea.

3. *Jackson Was Not Entitled To Appointment of Counsel or an Evidentiary Hearing*

In *Verdugo*, *supra*, 44 Cal.App.5th 320 this court held, after receiving a facially sufficient petition but before appointing counsel for the petitioner, the superior court may examine the readily available portions of the record of conviction, including any appellate opinion affirming the conviction, to determine whether the petitioner has made a prima facie showing that he or she could not be convicted of first or second degree murder following the changes made to sections 188 and 189 and thus falls within the provisions of section 1170.95. (*Verdugo*, at pp. 329-330, 332.) If the petitioner's ineligibility for resentencing is established as a matter of law by the petition itself and the record of conviction, the petition may be summarily denied. If not, the court must direct the prosecutor to file a response to the petition; permit the petitioner (through appointed counsel, if requested) to file a reply; and then determine, with the benefit of the parties' briefing and analysis, whether the petitioner has made a prima facie showing he or she is entitled to relief requiring issuance of an order to show cause and an evidentiary hearing. (*Id.* at p. 330.)

Here, as discussed, Jackson's petition described his commitment offense as attempted murder. Accordingly, his ineligibility for resentencing under section 1170.95 was established as a matter of law. The court did not err in summarily denying the petition.

DISPOSITION

The postjudgment order is affirmed.

PERLUSS, P. J.

We concur:

SEGAL, J. FEUER, J.